United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1260

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P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

SEYMOUR ROSENWASSER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND HEARING *EN BANC*

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UNITED STATES COURT OF APPEALS
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Preliminary Statement

Appellant Seymour Rosenwasser's conviction was affirmed by this Court on February 24th, 1977. The majority opinion was written by Judge Hays and joined by Judge Timbers. United States v. Rosenwasser, --- F.2d --- (2nd Cir., February 24th, 1977), sl.op. p.1973. The third member of the panel, Judge Gurfein, dissented in a separate opinion; sl.op. p.1980.

This petition for rehearing is two-pronged. Appellant first submits that because of the far-reaching impact on the trials of criminal cases in this circuit, the majority decision

on the admissibility of similar acts in a multiple-defendant trial where the defendant claiming prejudice was "connected" to the similar act, although ostensibly that evidence was not admitted against him, should be reviewed by the entire court en banc; Rule 35, Federal Rules of Appellate Procedure.

The second prong of appellant's petition for rehearing deals with the issue of his sentence. With respect to the sentencing point, appellant requests that the panel which decided his case rehear the matter; Rule 40, Federal Rules of Appellate Procedure. Appellant respectfully submits that the majority has overlooked certain factual matters which pertain to appellant's sentence and that reconsideration will probably bring about a different result. National Labor Relations Board v. Brown & Root, Inc., 206 F.2d 73 (8th Cir., 1953):

> "The purpose of a petition for rehearing, under the Rules of this Court, is to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." 206 F.2d at 74.

In this regard, appellant respectfully requests the majority to review his sentencing minutes and the sentencing minutes of co-defendant Gerald Allicino in order to determine whether appellant was improperly sentenced and thus whether the case should be remanded to a different district court judge for

resentence.*

POINT I

PETITION FOR REHEARING EN BANC; THE PRIOR SIMILAR ACT ARGUMENT.

Perhaps the most significant weapon in a federal prosecutor's arsenal is the prior or subsequent similar act evidence. Although subject to cautionary and limiting instructions, the invitation to reason that if a defendant committed the same or similar act at another time, then he "probably" did the act for which he was on trial is ever present. Nevertheless, it has been held in this and other circuit courts that the admission of such evidence is proper under appropriate circumstances. United States v. Deaton, 381 F.2d 114, 117 (2nd Cir., 1967); United States v. Brettholz, 485 F.2d 483, 487 (2nd Cir., 1973); United States v. Torres, 519 F.2d 723, 727 (2nd Cir., 1975); United States v. Papadakis, 510 F.2d 287, 294 (2nd Cir., 1975; United States v. Gerry, 515 F.2d 130, 140-41 (2nd Cir., 1975). See, also, Federal Rules of Evidence, Rule 404(b).

It is, of course, too late in the evolution of existing law on this subject to develop an effective argument against the rule that "evidence of similar acts, including

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*These sentencing minutes appear in appellant's appendix at pages A 179 and A 190.

other crimes, is admissible when it is substantially relevant for a purpose other than merely to show a defendant's criminal character or disposition." However, the majority opinion in this case, it is respectfully submitted, has broadened the similar act rule to a point where, in a multiple-defendant trial, a co-defendant against whom the similar act is not admitted would be severely prejudiced, indeed to the point where he may lose his constitutional right to a fair trial.

This Court has held on prior occasions that other similar acts may be admitted in a multiple-defendant trial, with proper cautionary instruction, against one co-defendant but not another. United States v. Payden, 536 F.2d 541, 543 (2nd Cir., 1976); United States v. Papadakis, supra; United States v. DiSapio, 435 F.2d 272, 280 (2nd Cir., 1970). But as Judge Gurfein points out in his dissenting opinion, in each of these cases "it is abundantly clear that the co-defendant who claims prejudice could not have been involved in the similar offense." Sl.op. p.1984 (emphasis supplied).

For apparently the first time, this Court has allowed the introduction of similar act evidence in a multiple-defendant trial where the co-defendant claiming prejudice was subliminally involved in that act. The Assistant United States Attorney, at the oral argument of this case, was not able to state that Rosenwasser was not involved in the stolen liquor transaction, sl.op. p.1985. In the government's opening statement, this so-called "connection" was emphasized and relied upon. (T 19)

Therefore, in this case we are dealing with the serious probability of a spillover effect to a defendant who was not intended to be the target of the introduction of evidence concerning similar acts. The majority has ruled that cautionary instructions in this situation, which parenthetically is more likely to recur in view of this Court's opinion, will suffice. This proposition, however, as the majority itself has recognized, is something less than clear cut. ("This is a close question, and appellant's argument is not without merit." Sl.op. p.1977). Appellant submits that under the principles set forth in Bruton v. United States, 391 U.S. 123 (1968), the damage could not be undone.

Appellant, in submitting this application for rehearing en banc, is not naive. Admission of similar acts under these circumstances may become, if it has not already, the law of this circuit. However, appellant submits that this position represents a dramatic expansion of the prosecutor's use of similar act testimony. This is not merely an adversarial observation, but one also recognized by Judge Gurfein in his dissent; sl.op. p.1989-90. As such, it is respectfully submitted, the issues should be decided by the entire Court.

POINT II

ON REHEARING, THIS PANEL SHOULD RECONSIDER THE SENTENCING POINT AND THEN REMAND THE CASE FOR RESENTENCING.

Pursuant to Rule 40 of the Federal Rules of Appellate

Procedure, appellant Seymour Rosenwasser respectfully asks this Court to reconsider the sentencing point and draws specific reference to both his own sentencing minutes and the sentencing minutes of co-defendant Gerald Allicino. Appellant will not belabor the point. It is clear, indeed clear beyond peradventure, that if Rosenwasser's sentencing minutes are read in the context of Allicino's sentencing minutes, Rosenwasser received a two-year sentence as a direct result of his involvement, or as this case evolved, his "non-involvement" in the stolen liquor transaction. Consider the fact that Allicino received a prison term of eight months in recognition of the fact that he had already been punished for the stolen liquor transaction. Rosenwasser, on the other hand, not having been charged or punished for the stolen liquor transaction, received a prison sentence of two years. This disparity only makes sense when Rosenwasser's sentence is considered to include punishment for the stolen liquor transaction. Indeed, as noted in appellant's brief, at oral argument and in Judge Gurfein's dissent, this phenomenon is ironically described in a letter to Mrs. Rosenwasser from the Chief Probation Officer. (A 201)

On this basis, appellant would respectfully ask that the matter be remanded for resentencing by another district court judge.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that appellant's petition for rehearing and hearing en banc should be granted in all respects.

Respectfully submitted,

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